(3)

No. 03-1655

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOE LEWIS and JUDY LEWIS, as Parents and Guardians of BRANDON D. LEWIS, and BRANDON D. LEWIS, an Individual Florida Resident,

Petitioners,

v.

THE UNITED STATES OF AMERICA, THE UNITED STATES COAST GUARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Table of Appendices iv

I. No Discretion To Act Negligently During A Search And Rescue. 1

A. Questions Presented Merit Immediate Supreme Court Review. 2

B. Discretionary Function Exception Rejected in Search and Rescues. 3

C. *Hurd*: Government argues discretionary function exception. 5

D. Coast Guard Has Achieved Wholesale Immunity: Government Tort Liability Eliminated. 6

II. Gravity Of Coast Guard Negligence. 9

A. Detrimental Reliance. 9

B. Coast Guard District Seven Mandates Divers Alert Network Training. 10

Conclusion 10

TABLE OF CITED AUTHORITIES

Page

Cases:

Berkovitz v. United States,
486 U.S. 531 (1988) 4, 7, 8

Bonner v. City of Prichard,
661 F.2d 1206 (11th Cir. 1981) (*en banc*) 3

Collazo v. United States,
850 F.2d 1 (1st Cir. 1988) 8

Huber v. United States,
838 F.2d 398 (9th Cir. 1988) 3

Hurd v. United States,
34 F.Supp.2d 745 (D. S.C. 2001), *aff'd*,
34 Fed.Appx. 77, 2002 AMC 1584, 2002
WL 7300284 (4th Cir. 2002) 1, 4, 5, 10

Indian Towing v. United States,
350 U.S. 61, 76 S. Ct. 122, 100 L Ed. 48 (1955)
..... 2, 4

Kermarec v. Compagnie Generale Transatlantique,
358 U.S. 625 (1959) 6

Northern Voyager LP v. Thames Shipyard & Repair Co.,
350 F.3d 247 (1st Cir. 2003) 2, 4

Sagan v. United States,
342 F.2d 493 (2d Cir. 2003) 3, 5

Cited Authorities

	Page
United States v. DeVane, 306 F.2d 182 (5th Cir. 1962)	3, 5
United States v. Gaubert, 499 U.S. 315 (1988)	8
United States v. Gavagan, 280 F.2d 319 (5th Cir. 1960), *cert. denied*, 364 U.S. 933, 81 S. Ct. 379, 5 L. Ed. 2d 365 (1961)	3, 5, 6, 7
United States v. Sandra & Dennis Fishing Corp., 372 F.2d 189 (1st Cir. 1967), *cert. denied*, 389 U.S. 836, 88 S. Ct. 48, 19 L. Ed. 2d 98 (1967)	2, 3, 5
Westfall v. Ervin, 484 U.S. 292 (1988)	7, 8
Statutory Provisions	
28 U.S.C. § 2680(a)	6
Other Authorities	
Restatement (Second) of Torts § 323 (1965)	2
Restatement (Second) of Torts § 324A (1965)	2

TABLE OF APPENDICES

Page

Appendix A — United States' Third Motion For Summary Judgment And Dismissal Dated March 14, 2000 ..... 1a

Appendix B — Memorandum In Support Of The United States' Third Motion For Summary Judgment And Dismissal Dated March 14, 2000 ..... 3a

Respondent interjects misstatements of law and fact which constitute new matters before this Honorable Court.

I. NO DISCRETION TO ACT NEGLIGENTLY DURING A SEARCH AND RESCUE. Under the discretionary function exception, the specific act to be examined here is the act of removing the injured diver to the Coast Guard vessel, engendering reliance that this would result in quicker treatment for the diver, when the Coast Guard knew – or should have known – that this would delay the moment when he would be able to get the oxygen he so desperately needed.

As a result of the Lewis vessel's reliance on the Coast Guard's search and rescue expertise and response to their distress call, Mr. Lewis became a victim of a severe spinal cord injury which has left him with permanent partial paralysis, incontinence and cognitive deficits at the age of seventeen. (R. 72). The Coast Guard made the plaintiff affirmatively worse off, since he would have received the critical oxygen sooner if the Lewis vessel had simply proceeded on its own to a point ashore where oxygen could have been administered. The civilian boat was faster, and precious time was wasted transferring Mr. Lewis to the Coast Guard boat.

The Eleventh Circuit's opinion expressly conflicts with the decisions of the First and Fourth Circuits in this regard:

> The Coast Guard holds itself out to the public as an expert in maritime search and rescue. It is, therefore, reasonable for others to perceive members of the Coast Guard as experts if they do not affirmatively disclaim competency in a particular case.

Hurd v. United States, 34 Fed.Appx. at 84-5.

> By its silence when it accepted the mission it must be found that the Coast Guard led the [rescuees] to believe that the [Coast Guard vessel] was reasonably capable of performing the task. This would include a representation that she was competently manned, or, to put it another way, the silence was an undertaking

> that the [Coast Guard crew] would perform its functions with reasonable care.

United States v. Sandra & Dennis Fishing Corp., 372 F.2d 189, 195 (1st Cir. 1967).

Those aboard the Lewis vessel were lured into relying on Coast Guard's public professions of expertise. In the midst of an emergency, when the Coast Guard offers to help, a layman on a boat naturally believes that the Coast Guard's offer really will constitute help, and not a setback, making a victim worse off. This satisfies the Good Samaritan doctrine. *Restatement (Second) of Torts* § 323 and § 324A. But even when the Good Samaritan standard of liability is met, the Eleventh Circuit nevertheless now holds that the government is virtually *always* immune for whatever harm the Coast Guard may do – so long as it is purporting to carry out a rescue on the water.

In its brief, the government declines to acknowledge that the Eleventh Circuit stands starkly at odds with the remaining circuits that have addressed this kind of fact pattern – and with the whole of rescue jurisprudence up until a year ago. *See contra.*, *Northern Voyager LP v. Thames Shipyard & Repair Co.*, 350 F.3d 247 (1st Cir. 2003). Before then, the jurisprudence was uniform, reaching back at least to *Indian Towing*: once the government undertakes a task (like keeping a light in a lighthouse burning or rescuing someone at sea), it is as responsible in tort for its lapses, just as any civilian would be.

The idea that the discretionary function exception swallows the liability of the Good Samaritan standard — as adopted recently by the First and Eleventh Circuits — has been raised before. In every situation, the government's plea of the discretionary function exception has been rejected. In fact, there is a quite a logical and workable dividing line between the realm of liability under the Good Samaritan doctrine, on the one hand, and the reach of the discretionary function exception on the other.

A. Questions Presented Merit Immediate Supreme Court Review. Respondents' attempt to restate the questions presented

to this Court misses the proverbial boat. Petitioners challenge the Eleventh Circuit's finding that the Coast Guard does not have to act with reasonable care in conducting a search and rescue and the elimination of government tort liability.

The Eleventh Circuit has now departed from nearly 50 years of maritime jurisprudence. The Eleventh Circuit's decision conflicts with this Court's precedent and the decisions of the First, Fourth, Fifth, Sixth and Ninth Circuit Courts of Appeals. Each of these circuits have either explicitly or implicitly discussed the discretionary function exception in finding the Coast Guard amenable to suit for negligently conducted search and rescue missions.

B. Discretionary Function Exception Rejected in Search and Rescues. Respondents do not address the well-settled rule of law that once the Coast Guard undertakes a rescue and engenders reliance thereon, the Coast Guard is obligated to use reasonable care in carrying out the rescue. *United States v. DeVane*, 306 F.2d 182, 186 (5th Cir. 1962)[1]; *United States v. Gavagan*, 280 F.2d 319, 328 (5th Cir. 1960) (analogizing this Court's holding in *Indian Towing* to a Coast Guard search and rescue); *United States v. Sandra & Dennis Fishing Corp.*, 372 F.2d 189, 195-96 (1st Cir. 1967) (Coast Guard's duty to use reasonable care during search and rescue extends to implicit representations that the Coast Guard "would perform its functions with reasonable care."); *Sagan v. United States*, 342 F.2d 493, 498 (2d Cir. 2003) ("However, once the Coast Guard undertakes a rescue operation, it must act with reasonable care."); *Huber v. United States*, 838 F.2d 398, 401-02 (9th Cir. 1988) ("This is not a case where the Coast Guard decided to conserve its resources by not assisting vessels in certain situations. Instead, the Coast Guard decided to aid the [vessel], and then allegedly did so in a

1. Contrary to Respondents' contentions (Br. 10, fn 6), the Eleventh Circuit has violated its own controlling precedent as the circuit court is bound by the former Fifth Circuit's decisions of *Gavagan* and *DeVane* absent a decision from the Eleventh Circuit sitting en banc. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc).

negligent manner."); *Hurd v. United States*, 134 F.Supp.2d 745, 768-69 (D. S.C. 2001) (discretionary function exception does not apply because the "Coast Guard exercised its discretion by making the policy decision to render aid in the search and rescue operation, and concomitantly was obligated to exercise reasonable care in the operation."), *aff'd*, 34 Fed.Appx. 77, 2002 AMC 1584, 2002 WL 7300284 (4th Cir. 2002) (unpublished)[2]; *see Indian Towing v. United States*, 350 U.S. 61, 69 (1955) ("once [Coast Guard] exercised its discretion to operate a light . . . and engendered reliance . . . it was obligated to use due care. . . .")[3].

None of these decisions were discussed by the district court or circuit court below. Respondents mistakenly contend that the aforementioned cases do not implicate the discretionary function exception. Not only does this argument misread the plain text of these opinions but also directly contradicts the government's arguments to those courts. Perhaps, the easiest explanation is that, until now, no court has applied the discretionary function exception in a single distress-at-sea case which met the Good Samaritan criteria. *Cf., Northern Voyager LP v. Thames Shipyard & Repair Co., supra.*

Rescue jurisprudence has always followed and validated this distinction. When the claim is that the government failed to participate, or to be properly equipped, it fails to satisfy the Good Samaritan doctrine, and fails for that reason, sometimes

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2. Respondents' arguments and supplemental memorandum relating to the perceived uncertainty in the Fourth Circuit (i.e. whether the Federal Tort Claims Act's discretionary function exception applies to cases brought under the Suits in Admiralty Act) are irrelevant to the conflict between the Eleventh and Fourth Circuits. In *Hurd*, the district court found the Coast Guard negligent of wanton and reckless conduct after a thorough analysis assuming that the discretionary function exception did apply to the Suits in Admiralty Act. 134 F.Supp.2d at 768.

3. *See Berkovitz v. United States*, 486 U.S. 531, 538, fn. 2 (1988) ("The decision in *Indian Towing v. United States*, also illuminates the appropriate scope of the discretionary function exception.") (internal citation omitted).

coupled with a discretionary function analysis. When the claim is that the government undertook to participate and caused harm by making the plaintiff worse off, it satisfies the Good Samaritan doctrine, and the discretionary function exception is not raised by the government, or is not mentioned by the court, or is overtly rejected.

Had the rule recently adopted by the First and Eleventh Circuits been the law, however, it would have reversed the outcome in virtually all the cases where the Coast Guard has been held liable heretofore. *See DeVane, supra*; *Huber, supra*; *Sagan, supra*; *Hurd, supra*; *Sandra & Dennis Fishing Corp., supra*; *Gavagan, supra*. The rule itself is thus utterly irreconcilable with the jurisprudence of the rest of the nation – regardless of how often or seldom the discretionary function exception has been overtly mentioned in the decisions.

C. *Hurd*: Government argues discretionary function exception. In *Hurd v. United States*, *supra*, the government urged the district court to find the Coast Guard's actions (or inactions) were discretionary. The Coast Guard moved for summary judgment[4] and claimed wholesale discretion to determine when and how to respond to a distress at sea. Pet. App. 21a. The government's reliance on the discretionary function exception advocating the district court to find immunity is clear. Pet. App. 16a-21a. The district court denied the United States' third motion for summary judgment and, following a trial on the merits, entered judgment in favor of the plaintiffs.

Like *Hurd*, *Gavagan*, *DeVane*, *Huber*, *Sandra & Dennis Fishing Corp.*, and *Sagan*, the present case involves Coast Guard conduct that occurred after the decision to undertake a search and rescue mission was made. Once the rescue has begun, the Coast Guard must act with reasonable care, and, like any private party, is liable for its negligence where the victim's detrimental reliance fulfills the Good Samaritan criteria. These well-settled and controlling principles are at the heart of this Petition and merit immediate review.

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4. Pet. App. 1a-2a.

D. Coast Guard Has Achieved Wholesale Immunity: Government Tort Liability Eliminated. While Respondents virtually concede that Petitioner's have a valid cause of action and that the Petition merits review, they ask this Court to endorse the Eleventh Circuit's opinion granting the Coast Guard wholesale immunity for all Coast Guard acts, including search and rescue missions. Br. 12. Regardless of which portion of 28 U.S.C. § 2680(a) the government relies, Respondents consistently state that the Coast Guard does not have a duty to act with reasonable care during a search and rescue. Respondents want the Supreme Court to overrule its own precedent and grant blanket immunity for any and all acts during a search and rescue regardless of whether the Coast Guard's actions made the victim's condition worse. This Petition merits review to resolve the split between the First, Fourth, Fifth, Sixth, Ninth Circuits and Eleventh Circuit.

That the Coast Guard owed Petitioners a duty of care is clear under Congressional mandates, decisions of this Court, controlling decisions within the Eleventh Circuit, and numerous other circuit courts of appeals.[5]

Respondents misapprehend Petitioners' statement that the Coast Guard enjoys sovereign immunity if it chooses not to respond to a search and rescue. Suggesting that the Coast Guard cannot waive its sovereign immunity once a rescue is undertaken, directly conflicts with the plain language and purpose of the remedial statutes at issue as well as a substantial body of controlling legal precedent. The Eleventh Circuit's opinion is at odds with The Suits in Admiralty, Public Vessels Act and the Federal Tort Claims Act's discretionary function exception and distress-at-sea jurisprudence. The Respondents' attempt to characterize all Coast Guard search and rescue

5. In addition to the decisions finding the Coast Guard responsible for search and rescue negligence, the general maritime law of the United States applies "the standard of reasonable care to nearly every situation, disdaining as it often does the fine spun distinctions indigenous to the common law." *Gavagan*, 280 F.2d at 328, *citing Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

decisions as discretionary. However, not all discretionary decisions fall within the discretionary function exception. Only those decisions grounded in public policy are protected. *Berkovitz*, 486 U.S. at 536-37. The Coast Guard's search and rescue response (once it made the decision to undertake the rescue) does not involve public policy decisions as the the challenged conduct does not involve a permissible exercise of policy judgment:

> Moreover, assuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is *of the kind* that the discretionary function was designed to shield. The basis for the discretionary function exception was Congress' desire to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in *social, economic, and political policy* through the medium of an action in tort."

Id. There are no concerns of judicial "second guessing" or "armchair admirals" as the:

> imposition of liability, i.e. duty, will not deter performance of like search and rescue projects by the Government. The Government's vast machinery is put into operation, not out of any hope of reward, but out of a policy determination on the highest executive level that the resources of the governmental agencies should be exploited effectively to save life and property.

Gavagan, 280 F.2d at 326.

Absent Supreme Court review, the Eleventh Circuit's ruling will stand tort litigation against the government on its head as the discretionary function exception will swallow the rule of federal tort liability. This would defeat Congress' clear intent. The Supreme Court expressed great concern about this possibility in *Westfall v. Ervin*, 484 U.S. 292 (1988) decided just five months before *Berkovitz*, and itself cited in *Berkovitz*:

> If the precise conduct is not mandated by law, petitioners argue, then the act is "discretionary" and

> the official is entitled to absolute immunity from state-law tort liability. *We reject such a wooden interpretation of the discretionary function requirement.* Because virtually all official acts involve some modicum of choice, petitioners' reading of the requirement would render it essentially meaningless.

Westfall, 484 U.S. at 298 (1988) (italics added).

Perhaps the best illustration of the importance of this distinction is the classic government-driver scenario. Government drivers unavoidably possess a level of discretion about how they drive. That discretion clearly calls upon and expects them to make safety decisions. *See United States v. Gaubert*, 499 U.S. 315, 325, fn. 7 (1990). The government relies on directives that employ the word "discretion" in dealing safely with distress situations. This, it suggests, supports immunity for the government in this case. But this logic would extend the discretionary function exception to protect the government driver, whose acts have never enjoyed this protection. *See Gaubert,* 499 U.S. at 325 & fn. 7; and Scalia, J. (concurring), *id.* at 336 (1991) (driver's discretion outside scope of exception).[6] If the action of the Eleventh Circuit is affirmed, there will be no principled reason to distinguish these scenarios from each other.

The discretionary function exception will swallow the rule and eliminate government tort liability. This cannot be the law, because the actions complained of here did not call for or permit the Coast Guardsmen involved to weigh considerations of *social, economic, or political* policy. Thus, under the *Berkovitz* analysis, no protected discretion attached to the actions of the Coast Guard here. With the Coast Guard present only to "offer help," just like any other helpful mariner who might be on scene, there is simply no way that the people on scene were to take into account

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6. *See, e.g., Collazo v. United States*, 850 F.2d 1 (1st Cir. 1988) (J. Breyer) (discretionary function exception does not protect the government from suit by reason of errors in medical care on the part of a government physician).

any considerations of "social, economic, and political policy" in deciding what to do about a man with the bends. This was a simple matter of getting Mr. Lewis to oxygen and a decompression chamber, in the quickest possible way.

The Coast Guard is amenable to suit for responding to a known life-threatening, specialized rescue with an untrained and ill-equipped crew who relayed estimated times of arrival that were off by one-hundred percent each way and significantly delayed Mr. Lewis' treatment. The Coast Guard's search and rescue expertise was offered and relied upon by the Lewis vessel. Unfortunately, the facts of the instant case demonstrate that the Lewis vessel's detrimental reliance resulted in a permanent worsening of Mr. Lewis' condition.

II. GRAVITY OF COAST GUARD NEGLIGENCE.

A. Detrimental Reliance. The Coast Guard knew they were responding to a person with decompression sickness and/or air gas embolism – both life threatening injuries. (R. 29- Composite Exhibit 6: Weeks, p.107, line 21-25, p.108). Both remaining members of the Lewis vessel testified that after Mr. Lewis was transferred to the Coast Guard boat, they were going much slower than before, and could have arrived at Mayport faster if they had never transferred Mr. Lewis to the Coast Guard boat. (R. 29-Composite Ex. 14: C. Lewis, p.96, lines 1-6; Altieri, p.93, lines 21-25, p.94, lines 1-2). **Both would also testify that they believed that Mr. Lewis was receiving life saving medical care while on board the Coast Guard vessel; which was their sole reason for calling the Coast Guard.** (R. 29-Composite Ex. 15: C. Lewis, p.95, lines 5-25; Altieri, p.127, lines 15-25, p.128, lines 1-8). One crew member testified that not a single crew member was permitted to do anything to help Mr. Lewis. (R. 29-Ex. 12). **In fact, the Coast Guard Coxswain testified that even if the boat had oxygen aboard and he knew Mr. Lewis would die without oxygen, he would not administer it.** (R. 29-Composite Ex. 17: Burke, p.183, lines 20-25, p.184, lines 1-13).

The Lewis vessel only relinquished Brandon Lewis to the Coast Guard upon the well-founded belief that he would be given immediate oxygen and transported to a decompression chamber more quickly. Instead, the Coast Guard did nothing other than delay Mr. Lewis' treatment. In effect and contrary to the reasonable expectations of the Lewis vessel, the Coast Guard operated as nothing more than a water taxi, ferrying a patient with known life threatening injuries to a drop off point; where the real rescue would begin in the hands of the Life Flight crew.[7] The Eleventh Circuit's opinion destabilizes the general maritime law in creating express conflicts among the circuits through the elimination of Coast Guard responsibility in distress-at-sea cases.

B. Coast Guard District Seven Mandates Divers Alert Network Training. The Coast Guard knew as early as 1996 that the administration of oxygen to a diving decompression illness victim was essential. (R. 29-Ex. 18). The Coast Guard accepted a very generous offers from the renowned Divers Alert Network ("DAN") to train Coast Guard crewmen – free of charge – in the administration of oxygen so that they would be able to properly respond to the rescue of a "bends" victim. (R. 29-Ex. 19). This policy directive was issued to the Coast Guard station at issue. (R. 29-Ex. 21, 22, 23, & 24).

This policy was ignored at Group Mayport and culminated in the Coast Guard exercising its discretion to undertake the rescue of a known diving victim with serious life-threatening injuries. The search and rescue was performed without any regard for reasonable care and permanently worsened Mr. Lewis' injuries.

CONCLUSION

For the reasons set forth above, the Petitioners respectfully request that the petition for writ of certiorari be granted.

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7. *See Hurd v. United States*, 134 F.Supp.2d at 759 ("A Coast Guard rescue involves more than simply putting a boat in the water.")

Respectfully submitted,

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APPENDIX

APPENDIX A — UNITED STATES' THIRD MOTION FOR SUMMARY JUDGMENT AND DISMISSAL DATED MARCH 14, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

C/A: 2:99-0240-18

C/A: 2:99-0241-18

C/A: 2:99-0242-18

C/A: 2:99-0243-18

DEIRDRE LYNN HURD, as Personal Representative of the Estate of Bobby Lee Hurd, Jr., deceased,

and

MARY E. MOORE CORNETT, as Personal. Representative of the Estates of Michael Paul Cornett, deceased, Michael Wayne Cornett, deceased, and of James Daniel Comett, deceased,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Appendix A

UNITED STATES' THIRD MOTION FOR SUMMARY JUDGMENT AND DISMISSAL

COMES NOW defendant, United States of America, by and through undersigned counsel, and pursuant to Local Rule 7 and Rule 12(b)(6) of Federal Rules of Civil Procedure, hereby moves this honorable Court to dismiss plaintiffs complaints for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction. Additionally, pursuant to Rule 56 of the Federal Rules of Civil Procedure, the United States moves for summary judgment because there is no genuine dispute of material fact and because the United States is entitled to judgment as a matter of law. The United States' motion is supported by the attached Memorandum of Law and exhibits thereto.

Date: March 14, 2000

Respectfully submitted,

DAVID W. OGDEN
Acting Assistant Attorney General

[additional signatories omitted]

APPENDIX B — MEMORANDUM IN SUPPORT OF THE UNITED STATES' THIRD MOTION FOR SUMMARY JUDGMENT AND DISMISSAL DATED MARCH 14, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

C/A: 2:99-0240-18

C/A: 2:99-0241-18

C/A: 2:99-0242-18

C/A: 2:99-0243-18

DEIRDRE LYNN HURD, as Personal Representative of the Estate of Bobby Lee Hurd, Jr., deceased,

and

MARY E. MOORE CORNETT, as Personal. Representative of the Estates of Michael Paul Cornett, deceased, Michael Wayne Cornett, deceased, and of James Daniel Comett, deceased,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Appendix B

MEMORANDUM IN SUPPORT OF THE UNITED STATES' THIRD MOTION FOR SUMMARY JUDGMENT AND DISMISSAL

INTRODUCTION

On the night of December 28, or early morning of December 29, 1998, the sailing vessel MORNING DEW allided with the north Charleston jetty. Michael Wayne Cornett, his two sons, James Daniel Cornett and Michael Paul Cornett, and a cousin, Bobby Lee Hurd, were aboard the vessel. There are no eye-witnesses to the accident, and no survivors. Little is known about the circumstances surrounding the allision, or the movements of the boat and its passengers afterwards. The next morning two bodies (Bobby Lee Hurd and Daniel Cornett) were found by passers-by at a beach at Sullivans Island, and a search and rescue mission was initiated.

Plaintiffs contend that the Coast Guard, acting though the pilots association, had undertaken a search and rescue mission in the early morning, before the bodies were discovered, and that the Coast Guard's negligence in conducting that search and rescue mission resulted in the deaths of the victims of the MORNING DEW tragedy.

The Government contends that the Coast Guard, as a Good Samaritan, had no duty to rescue those victims, and that it did not engage in any conduct that worsened the position of the victims of the MORNING DEW allision. While the Coast Guard relied on information provided by the pilots association in order to determine *whether* to

undertake a search and rescue mission, such reliance by the Coast Guard is not the equivalent of undertaking a search and rescue mission. As discussed in further detail below, summary judgment should be granted in favor of the United States because there is no genuine dispute of material fact and because the United States is entitled to judgment as a matter of law. Furthermore, plaintiffs' claims are subject to dismissal for failure to state a claim for which relief may be granted and for lack of subject matter jurisdiction.

FACTS

A. SUBSTANTIVE

On the morning of December 29, 1998, Petty Officer Eric Shelley was standing the telecommunications watch at the Coast Guard Station in Charleston. At 2:18 a.m., as he was getting coffee, he heard a radio transmission. [Shelley deposition, Attached as Exhibit A, page 20]. The transmission sounded, to Shelley, like a person calling the Coast Guard. [Telephone Log, Attached as Exhibit B, page 133]. Shelley heard a young person call "U.S. Coast Guard, U.S. Coast Guard," but did not hear the word mayday. [Ex. A, page 75; Ex. B, page 133]. The sound of the voice, alone, did not indicate distress. [Ex. A, page 75]. Within 13 seconds, Shelley twice attempted to make contact with the caller, and received no response. [Radio Log, Attached as Exhibit C, pages 13-14].

At 2:22 a.m., Shelley heard a static transmission. [Ex. A, page 30]. He twice attempted to make contact with the caller, advising that he was standing by, monitoring Channel 16, [Ex. C, page 13]. There was no response. *Id.*

Appendix B

At 5:18 a.m., John Stuhr, who was operating the Charleston, Pilot Boat PALMETTO STATE, carried a Charleston Pilot to the auto carrier PEARL ACE, and began the voyage back to the dock, traveling in the lee of the PEARL ACE. [Stuhr Statement, Attached as Exhibit D, page 1]. Winds were blowing out of the Northeast at 25 knots, and the seas were about 5 feet. *Id.* Approximately an hour later, upon arrival at the dock, the pilot informed Stuhr that a boatswain on the inbound ship had heard someone yelling for help somewhere between buoy "22" and the beach. *Id.* The pilot asked Stuhr if he would turn around and investigate. *Id.* Within 10 minutes, Stuhr was on scene, searching for signs of persons in need of help. *Id.*

At 6:27 a.m., the Charleston pilot's office called the Coast Guard. [Ex. B, page 22]. Petty Officer Shelley took the call:

Pilots: Um, we got a pilot inbound, um, on a car carrier and he just passed 22 buoy, you know right inside the harbor.

Shelley: Uh huh, twenty, uh —

Pilots: Twenty two.

Shelley: Twenty Two. OK.

Pilots: And, uh, the boatswain on the ship radioed to the bridge that he heard somebody yelling for help and the pilot boats have gone, the pilot boat was here at the dock, they've gone back

out to look around, but the pilot wanted me to call you to let you know what was going on, like I 'said, we've got the pilot boat out there looking for somebody now.

Shelley: They weren't able to talk to them any.

Pilots: Well, no, it was somebody in the water.

Shelley: Oh, somebody in the water.

Pilots: Yeah, that's what they think.

Shelley: Oh, I see.

Pilots: Um, so the pilot boat, they were just getting up here to the dock but they just turned around and went back out to 22 to look around, what they're going to find I don't know.

Shelley: OK, how, many, which pilot boat went out there?

Pilots: CAROLINA. Excuse me, wait a minute, we had problems with the boats last night. PALMETTO STATE.

Shelley: PALMETTO STATE.

Pilots: But if I guess once they get back to 22, 1 can call you back and let you know what they see or hear but I don't even —

Shelley: OK, OK, well I'll alert the station and they'll determine if they want to get underway also.

Pilots: Oh, OK. Well I can, if you want, I can call you back once they get out there to 22 buoy and see what they find.

Shelley: OK, could you.

Pilots: Yeah, yeah.

Shelley: Alright.

Id. Shelley passed the information on to Petty Officer Hartzog[1] and Perry Officer Sass.[2] [Ex. A, page 44]. Sass checked the location of Buoy 22 on the chart, and decided that he would wait for the information from the pilot boat in order to decide whether there actually was anything out there. [Sass Deposition, Attached as Exhibit E, pages, 15, 59].

At 6:46 a.m., John Stuhr contacted the pilot office and advised that he had not seen or heard anyone. [Ex. D, Page 1]. At the pilot's request, Stuhr remained in the area until twilight, when visibility improved, and continued the search towards the cove. *Id.* He did not see any signs of people needing help. *Id.* He informed the pilot office that nothing looked peculiar, and returned to the dock at 7: 15. *Id.*

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1. Petty Officer Hartzog was the telecommunications watchstander who relieved Shelly from his watch. [Ex. A, page 38].

2. Petty Officer Sass was the Operations Duty Officer ("ODO"). [Ex. E, page 7].

Appendix B

While Stuhr was continuing his search, the pilot office called the Coast Guard. [Ex. B, pages 22-23]. Petty Officer Hartzog received the call:

Hartzog: Charleston Communications, Petty Officer Hartzog, may I help you?

Pilots: Hey, this is the Pilot Office.

Hartzog: Hey.

Pilots: I called there earlier, did I talk to you?

Hartzog: No, but I was briefed on what you said.

Pilots: Oh, OK. Well, the pilot boat's out there and they don't see anything and they haven't heard anything, so they're going to come on back. Hartzog: Alright, thanks a lot.

Pilots: Thank you

Id. There were no other communications between the pilot office and the Coast Guard regarding the pilot boat's search. *Id.*

At 11:15 a.m., the Sullivans Island police department contacted the Coast Guard to advise that a body had been discovered on the beach, and that another body had been discovered in the water. [Ex. B, pages 58-59].[3] The Sullivan's

3. These were determined to be the bodies of Bobby Hurd and Daniel Cornett. The bodies of Michael Wayne Cornett and Michael Paul Cornea were found later, in different locations.

Island police department requested the Coast Guard's assistance, and the Coast Guard indicated that it would provide assistance. *Id.* Shortly thereafter, a search and rescue mission was initiated. [Ex. E, pages 45-47].

B. PROCEDURAL

In their original complaints, plaintiffs contended that the United States was liable for failing to undertake a search for the MORNING DEW. The United States filed a motion to dismiss the complaint for failure to state a claim for which relief may be granted because the United States has no duty to rescue persons or property in distress. Plaintiffs did not file an opposition to the United States' motion. Following a hearing on the motion, the United States' motion was denied, without prejudice, and plaintiffs were directed to amend their complaints.

On or about June 23, 1999, plaintiffs filed amended complaints. In their amended complaints, plaintiffs contend that the Coast Guard, either through the use of its own resources and/or by obtaining and/or relying on the assistance of others, undertook an attempt to rescue plaintiffs' decedents. On July 10, 1999, the United States filed a motion to dismiss the amended complaints, or in the alternative, for summary judgment. In that motion, the United States contended that it had not initiated a search and rescue, and that the voluntary undertaking of the pilots association could not be considered the equivalent of an undertaking by the United States.

Appendix B

Plaintiffs filed an opposition and an affidavit of counsel pursuant to Fed. R. Civ. P. 56(f). In the affidavit, plaintiffs' counsel stated that plaintiffs needed to depose seven Coast Guard witnesses before they could present the facts essential to justify plaintiffs' opposition to the United States' motion. The United States filed a supplemental memorandum in support of its motion, arguing that further discovery would be futile because the essential facts had already been established by contemporaneous records that were available to plaintiffs. The Court denied the United States' motion without prejudice, allowing plaintiffs to conduct discovery and depose those individuals identified in their Fed. R. Civ. P. 56(f) affidavit.

The seven witnesses identified by plaintiffs have all been deposed, and the parties have exchanged written discovery. While plaintiffs have been able to elicit various opinions and interpretations of the MORNING DEW tragedy, plaintiffs' discovery efforts have not resulted in any change of the basic facts. This matter is ripe for disposition.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil procedure 56(c) provides that summary judgment shall be rendered if there is no genuine issue as to any material fact, and if the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure

the just, speedy and inexpensive determination of every action. *Celotex v. Catrett*, 477 U.S. 317, 327 (1986). The standard of review mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986).

A party moving for summary judgment has the initial burden of supporting its motion with written discovery, affidavits or other documentary evidence, which demonstrate that there is no genuine dispute as to any material fact. *United Slates v. Four Parcels of Real Property*, 941 F.2d 1428 (11th Cir. 1991) (en banc). Once this burden is met, the non-moving party must "go beyond the pleadings" and designate specific facts supported by affidavits, depositions and/or other discovery, which demonstrate a genuine issue for trial. *Celotex*, 477 U.S. at 324; *Four Parcels*, 941 F.2d at 1438. If the non-movant's evidence is colorable or not "significantly probative", summary judgment is appropriate. *Anderson*, 477 U.S. at 249.

The evidence must be reviewed in the light most favorable to the non-moving party. *Plastique Tags, Inc. v. Asia Trans Line Inc.*, 83 F.3d 1367 (11th Cir. 1996). The mere existence of a scintilla of evidence in support of the non-movant's position, however, will be insufficient to avoid summary judgment. *Anderson*, 477 U.S. at 249. Instead, there must be evidence on which the jury could reasonably find for the non-movant. *Id.* at 252.

Appendix B

As discussed in further detail below, the United States is entitled to summary judgment and dismissal of plaintiffs' complaints because there is no genuine dispute of material fact and because the United States is entitled to judgment as a matter of law. The Coast Guard has no duty to initiate a search and rescue mission (hereinafter "SAR mission"). Instead, it has discretion to determine whether, and how, to respond to a reported distress situation. Furthermore, while the Coast Guard may have relied on the information provided by the pilots association, the receipt of information is not equivalent to the Coast Guard undertaking a SAR mission, and it does not transform employees of the pilots association into agents of the Coast Guard. Any holding to the contrary would eviscerate the United States' discretion regarding the initiation of SAR missions, and would expose the United States to broad ranging liability based on the conduct of independent Good Samaritans. Finally, summary judgment should be granted in favor of the United States because the undisputed facts establish that the United States did not engage in any conduct that worsened the position of decedents.

II. THE UNITED STATES COAST GUARD, AS A GOOD SAMARITAN, HAS NO DUTY TO UNDERTAKE A SEARCH AND RESCUE MISSION

Plaintiffs' claims, once stripped of the various theories in which they have been cloaked, boil down to an allegation that the Coast Guard could have, and should have, launched assets earlier than it did, and that, had it done so, plaintiffs' decedents would have been saved. Any claims based on such theories are subject to dismissal for failure to state a claim for which relief may be granted and for lack of subject matter jurisdiction.

Appendix B

Plaintiffs concede, as they must, that 14 U.S.C. §88 provides that the Coast Guard may perform acts or render aid necessary to perform rescue operations, and that this statute does not create any duty of affirmative action, even if requested.[4] *In re Weeks Dredging and Contracting Inc.*,

4. The universally accepted rule is, absent any statutory mandate or pre-existing duty, there is no duty to rescue another person in need of assistance. PROSSER AND KEETON ON TORTS § 56 at 375 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 314. See, also *United States v. Sandra & Dennis Fishing Corp.*, 372 F.2d 189, 195 (1st Cir. 1967) ("the applicable statutes, 46 U.S.C. §§741-752, 781-90, do not amount to a general undertaking by the United States to provide rescue service on demand."); *Lacey v. United States*, 98 F. Supp. 219, 220 (D. Mass. 1951) ("nowhere in the statute is there created a right to be rescued in the sense of an award of civil damages for the negligent failure of the Coast Guard to attempt to rescue a person in distress," and it is "not for the Court to create this right where such a novel tort liability is neither contemplated by the basic statute nor recognized by prior law."); *Kelly v. United States*, 531 F.2d 1144, 1147-8 (2d Cir. 1975) (the Coast Guard is authorized, though not obligated, to render aid to distressed persons, vessels and aircraft); *Albinder v. United States*, 703 F. Supp. 246 (S.D. N.Y. 1988) (no affirmative governmental duty to rescue a vessel in distress); *Kurowsky v. United States*, 660 F. Sup. 442, 450 (S.D. N.Y. 1986) ("There is no affirmative duty on the part of the Coast Guard to rescue or furnish assistance to a vessel or individual in distress. The decision to undertake a rescue is discretionary with the Coast Guard."), *Frank v. United States*, 250 F.2d 178 (3rd Cir. 1957) (legislation authorizing the Coast Guard to establish and operate rescue facilities and render aid to persons and property, falls short of creating a governmental duty of affirmative action owed to a person or vessel in distress); *Hood v. United States*, 695 F. Supp. 237, 242 (E.D. La. 1988) ("there is no affirmative duty on the part of the Coast Guard to rescue or furnish assistance to a vessel in distress");

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et. al., 1975 A.M.C. 1189 (E.D. Va. 1975), In short, the Coast Guard acts as a Good Samaritan in this area. Accordingly, courts have consistently recognized that the Coast Guard, like any private party, has no affirmative duty to undertake a rescue. *Korpi v. United States*, 961 F. Supp. 1335, 1346 (N.D, Cal. 1997) (citing cases), *aff'd*, 145 F.3d 1338 (9th Cir. 1998); *McLaughlin v. United States*, 671 F. Supp. 72, 74-75 (D. Me. 1987); *Daley v. United States*, 499 F. Supp. 1005, 1049 (D. Mass. 1980) (Aldrich, S.C.J.) (citing cases); *see*, *Frank v. United States*, 250 F.2d 178, 180 (3rd Cir. 1957), *cert. denied*, 356 U.S. 962 (1958); *see*, *also*, *Lacey v. United States*, 98 F. Supp. 219, 220 (D. Mass. 1951) ("It is well settled common law that a mere bystander incurs no liability where he fails to take any action, however, negligently or even intentionally, to rescue another in distress"). Any decision to provide assistance is purely discretionary, *Foltting v. United States*, 324 F. Supp. 585, 587 (S.D. Tex. 1971), and not subject to judicial review, *McLaughlin v. United States*, 671 F. Supp. at 75, because "Congress, in its legislation and its appropriations, not the courts, sets the limits of the Coast Guard's obligations," *Daley*, 499 F. Supp. at 1009, and

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Korpi v. United States, 961 F. Supp. 1335 (N.D. Cal. 1997) ("the Coast Guard has no affirmative duty to render aid to a vessel or person in distress"); In re CGC POINT JUDITH, 1989 A.M.C. 2367 (C.D. Cal. 1987) (Coast Guard has no affirmative duty to rescue a vessel or person in distress); *Wright v. United States*, 700 F. Supp. 490 (N.D. Cal. 1988) (same); *Shupe v. United States*, 1979 A.M.C. 2282 (C.D. Cal. 1979) (same); *Bunting v. United States*, 662 F. Supp. 971 (D. Alaska 1987); *DFDS Seacruises v. United States*, 676 F. Supp. 1193, 1200 (S.D. Fla. 1987) (the Coast Guard does not have a mandatory duty to provide rescue or salvage services); *Mazullo v. United States*, 1980 A.M.C. 1038 (D. D.C. 1979).

Congress has specifically provided that "the Coast Guard may perform any and all acts necessary to rescue and aid persons and protect and save property." 14 U.S.C. § 88(a)(1) (emphasis added); *see*, *Fernandez v. Brock*, 840 F.2d 622, 632 (9th Cir. 1988) ("may" is permissive). If Congress intended to charge the Coast Guard with a mandatory duty to rescue persons in distress, it would have done so as it has in other maritime contexts. *See*, *e.g.*, 46 U.S.C. § 2303(1) ("a master . . . of a vessel involved in a marine casualty shall render necessary assistance . . .") (emphasis added).

Even after discovery, this case remains very similar to *Daley v. United States*, 499 F. Supp. 1005 (D. Mass. 1980). In *Daley*, a group of four adults went fishing in Scituate Harbor. *Id.* at 1007. Their motorboat capsized, casting the four occupants into the water. *Id.* After darkness had fallen, a relative of the boat owner contacted the Coast Guard and advised that the fishing party had not returned, and that they never returned after dark. *Id.* The Coast Guard instituted a PRECOM.[5] *Id.* at 1008. By midnight, with the PRECOM still incomplete, a friend of one of the individuals aboard the boat falsely advised the Coast Guard that one of the boat occupants was pregnant, that the boating party had been drinking, and that they were inexperienced boaters. *Id.* The Coast Guard manned its ready boat and commenced a search. *Id.* Two survivors of the accident were found the next morning. *Id.* at 1009.

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5. A PRECOM is an inquiry of all harbor masters, etc., in the area to learn if the boat might have landed or been heard of elsewhere. 499 F. Supp. at 1008.

Appendix B

The wife of one of the two decedents brought suit against the Coast Guard, alleging that the Coast Guard should have initiated a search much earlier. *Id.* The District Court rejected this claim, explaining that "**there is no affirmative duty on the Coast Guard to institute a search, even if a court would have considered its refusal unreasonable**." *Id.* (emphasis added). The Court also rejected plaintiffs argument that the PRECOM was an initial step in a SAR mission, and that, having issued the PRECOM, the Coast Guard had undertaken a rescue and was under a duty to conduct that mission with reasonable care. *Id.* Characterizing the argument as a misconception and an overstatement, the Court explained that:

> [O]ne undertaking does not necessarily require another . . . The purpose of the PRECOM is to assist in determining whether to do anything further. Absent some promise or affirmative representation, of which there was none here, instituting a PRECOM commits the Coast Guard to nothing. Failure to follow it up is not comparable to abandoning a search that is already underway.

Id. See, also, Hood v. United States, 695 F. Supp. 237 (E.D. La. 1988) (Coast Guard had undertaken rescue of personnel aboard a sinking ship, but had not undertaken salvage of the ship). Plaintiffs make the same argument in this case, contending that the Coast Guard "commenced" a SAR mission when it consulted the chart in order to confirm the location of buoy 22 and/or received the information that had been provided by the pilots' office. There can be no doubt that the Coast Guard gathers information in order to decide

whether, and how, to conduct a SAR mission. Indeed, several Coast Guard witnesses have testified that the gathering of information is an initial step in a SAR mission [Ex. E, pages 60-62; Brown Deposition, Attached as Exhibit F, pages 16-18; Saunders Deposition, Attached as Exhibit G, pages 55-56]. It would be folly to suggest that the Coast Guard does not obtain, and often rely on, the reports of third parties in collecting information to be employed in the decision-making process of whether, and how, to conduct a SAR mission. This gathering and evaluation of information, however, is not the equivalent of an undertaking to launch assets in order to conduct a SAR mission.

As explained in *Daley*, absent affirmative misrepresentation,[6] one undertaking does not require another. *Daley*, 499 F. Supp. at 1009, As in *Daley*, the Coast Guard must be allowed to gather and evaluate information in order to determine whether it will initiate a SAR mission. Any holding to the contrary — i.e., that the Coast Guard is deemed to have "initiated" a SAR mission upon receipt of information regarding a reported distress and by checking a chart — would undermine the Coast Guard's discretion to determine whether it will initiate a SAR mission. In essence, such a holding would tell the Coast Guard: "if you are aware of a reported distress situation, you must immediately launch assets." The law governing the conduct of private parties, and the conduct of the Coast Guard, clearly does not impose such a

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6. Without question, there was no affirmative misrepresentation _____ advised the pilots office that he would notify the station, and ____ to get underway also. [Ex. B, page 22] (emphasis added). ____ F.2d 398 (9th Cir. 1988), the Coast Guard did not promise a ____.

duty. Instead, as discussed below, the Coast Guard has — and must retain — discretion to decide when and how to respond to reported distress situations.

McLaughlin v. United States, 671 F. Sup. 72 (D. ME 1987), is also similar. In *McLaughlin*, a citizen contacted the Coast Guard and advised that she could see a canoeist who was attempting to return to shore, but could not do so because of the wind and current. *Id.* at 74. The citizen also informed the Coast Guard that the canoeist was alone and without a lifejacket. *Id.* Small craft advisories were in effect. *Id.* The Coast Guard called the citizen 35 minutes later to inquire about the status of the canoeist. *Id.* The citizen reported that the canoeist was about an hour offshore, the water was whitecapping, there were no other boats or ships in the area, and that she would soon be losing sight of the canoeist. *Id.* The Coast Guard did not launch a SAR mission until 8:50 p.m., after the canoeist's wife advised that her husband had not returned from a fishing trip. *Id.* The SAR mission was unsuccessful. *Id.*

The decedent's wife sued the Coast Guard, alleging that because the officer who had taken the initial reports had "negligently, recklessly, and carelessly concluded that the decedent was not in any danger," the Coast Guard had failed to properly respond to the distress call. *Id.* Citing *Daley v United Status*, *supra*, the District Court dismissed the complaint based on the "well established principle that the Coast Guard is under no obligation to initiate search or rescue activity, and that a failure to do so is not subject to evaluation by a court for reasonableness." *Id.* at 75.

Appendix B

Plaintiffs are making the same allegations in this case. They contend that the Coast Guard should have perceived the severity of the situation that decedents were in, and should have responded differently. Regardless of where plaintiffs choose to focus the bright light of hindsight, it is clear that their claims boil down to an assertion that the Coast Guard could have saved decedents if had taken, the proper actions — i.e., launched SAR assets — in response to the information that the Coast Guard had received, or in response to information that the Coast Guard could have obtained. As in *McLaughlin* and *Daley*, these claims are subject to dismissal because there can be no liability premised on the theory that the Coast Guard should have responded to the information differently, or sooner. See, also *Frank v. United States*, 250 F.2d 178 (3d Cir. 1957) (dismissing claim based on theory that the Coast Guard was negligent in failing to get help to the decedent before he drowned).

Without question, the decision to undertake a rescue is discretionary with the Coast Guard.[7] *Kurowsky v. United States*, 660 F. Supp. 442, 450 (S.D. N.Y. 1986). See, also, *Wellington Transportation v. United States*, 481 F.2d 108,

7. By fashioning an exception for discretionary governmental functions, Congress took steps to protect the Government from liability that would seriously handicap discretionary government operations. *United States v. S.A. Empressa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984). Accordingly, courts lack subject matter jurisdiction over complaints challenging discretionary functions of the government. See, e.g., *Hughes v. United States*, 110 F.3d 765 (11th Cir. 1997). The discretionary function exception, which is set forth in the Federal Tort Claims Act, also applies to claims brought pursuant to the Suits in Admiralty Act. *Tiffany v. United States*, 931 F.2d 271, 277 (4th Cir. 1991).

110-11 (6th Cir. 1973); *United States v. Gavagan*, 280 F.2d 319, 328 (5th Cir. 1960), *cert. denied*, 364 U.S. 933 (1961); *United States v. DeVane*, 306 F.2d 182 (5th Cir. 1962); *In re American Oil Co. and the AMOCO VIRGINIA*, 417 F.2d 164, 168 (5th Cir. 1969); *Wright v. P.J. St. Pierre Marine*, 1990 A.M.C. 325 (S.D. Tex. 1989) ("decisions regarding the allocation of scarce resources, the training of personnel, the equipping of vessels, whether to render assistance, search and rescue policies and procedures, the method of response, and the provision of a mechanism for access to historical data on casualties are all discretionary in nature and shielded from tort liability"); *Hood v. United States*, 695 F. Supp. 237, 242 (E.D. La. 1988) (the decision of whether or not to undertake a rescue or salvage is discretionary with the Coast Guard); *In re CGC POINT JUDITH*, 1989 A.M.C. 2367 (C.D. Cal. 1987) ("the decision by the Coast Guard to provide assistance is purely discretionary"). Furthermore, the Coast Guard has discretion to decide that it will await further information from the pilots association in order to determine whether it will launch a SAR mission. Any holding to the contrary would be equivalent to a holding that the Coast Guard is required to activate assets and commence a SAR mission upon being notified of a possible distress situation. Congress, when it authorized the Coast Guard's search and rescue program, did not intend such a result, and the case law uniformly holds that the Coast Guard has discretion to determine whether and how to respond to distress situations. Accordingly, to the extent that plaintiffs challenge the Coast Guard's decision making process regarding the initiation of a SAR mission, including the Coast Guard's method of gathering and evaluating information, plaintiffs' claims are subject to dismissal for lack of subject matter jurisdiction.

III. THE CHARLESTON HARBOR PILOTS WERE NOT AGENTS OF THE UNITED STATES COAST GUARD

Plaintiffs contend that pilots association was acting on behalf of the Coast Guard, and/or that the Coast Guard acted through the pilots association when the pilots office reported that they were investigating a reported call for help. Plaintiffs' argument, while creative, is nothing more than an attempt to circumvent the well established precedent that the Coast Guard — like any private party — has no duty to rescue. As discussed below, neither the facts nor the law support plaintiffs' position.

According to the Restatement (Second) of Agency, an agency relationship is "the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Servis v. Hiller Systems, et. al.*, 54 F.3d 203, 207 (4th Cir. 1995). For purposes of the SAA, a primary factor in determining agency status is the degree of operational control exercised by the United States. *Id.* at 208. See, also, *United States v. Orleans*, 425 U.S. 807 (1976) ("the critical element in distinguishing an agency from a contractor is the Government's power to control the detailed physical performance of the contractor."); *Leone v. United States*, 910 F.2d 46, 50 (2d Cir. 1990) (the question is not whether a contractor must comply with federal regulations and apply federal standards, but whether its day-to-day operations are supervised by the Federal Government).

In this case, the contemporaneous record establishes that the United States exercised no operational control over the pilots association. All the Coast Guard did was receive the information the pilots provided. The pilots' decision to investigate a report that a call for help had been heard in the water was made independently by the pilots, without any input from the Coast Guard. Indeed, the pilots called the Coast Guard to make them aware of the situation after they had already sent a pilot boat to the area between the beach and buoy 22.

When the Coast Guard was made aware of the pilots' activity, it did not make any attempt to control or otherwise direct that effort. The contemporaneous, and exclusive record, of the communications between the pilots and the Coat Guard unequivocally establishes that the Coast Guard did not make any suggestions to the pilots regarding the scope of the search, the location, the method of searching, or the duration of the search. It was merely a receptor of the information supplied.

There is additional evidence that supports the conclusion that the Coast Guard did not exercise any operational control over the pilots. John Stuhr, the employee of the pilots association that had been asked by the pilot of the PEARL ACE to search in the area of buoy 22, reported his findings to the pilots, not the Coast Guard. Furthermore, when Stuhr reported to the pilot that he had searched and had not found anything, the pilot — not the Coast Guard — asked him to continue searching until twilight. Stuhr continued to search, returning to the dock at 7:15. After the pilot had asked Stuhr to continue searching until twilight, the pilots office advised the Coast Guard that they had not found anything, and that

they were discontinuing the search. This chronology makes it clear that the pilot association's decision to continue searching, even after initial efforts had not yielded any indication of a problem, was made independent of the Coast Guard.

Without question, the pilot association's decisions to undertake the search, how and where to search, and to continue searching until twilight, were made by the pilots association without any Coast Guard input whatsoever. There was no control of the "detailed physical performance" of the search, and there was no "day-to-day control" over the activities of the pilots association such that they could be considered, generally, agents of the United States. In sum, the pilots association was not acting for, or on behalf of, the Coast Guard.

Plaintiffs will undoubtedly argue that there was an agency relationship because the Coast Guard relied on the information that the pilots association provided. Even if the Coast Guard did rely on the information provided by the pilots association, this does not amount to an agency relationship because the Coast Guard exercised no control whatsoever over the pilots association, and because there was no manifestation of consent — by either party — that such control could be exercised. See, *Logue v. United States*, 412 U.S. 521, 531-32 (1973) (rejecting an argument that employees of a contractor should be considered agents of the United States simply because they are performing tasks that would otherwise be performed by employees of the government). Furthermore, the Coast Guard's acceptance of information by the pilots association is not the equivalent of

the initiation of a SAR, mission by the Coast Guard. *Daley*, 499 F. Supp. at 1009. Any holding to the contrary would subject the Coast Guard to virtually unlimited liability based on the conduct of independent Good Samaritans who report potential distress situations to the Coast Guard or respond independently to reported distress situations. See, *Servis v. Hiller Systems, et al.*, 54 F.3d 203, 207 (4th Cir. 1995) (refusing to find that independent third parties could be considered agents of the United States because such a finding would subject the United States to broad ranging liability). Plaintiffs' argument that the Coast Guard, acting through the pilots association, initiated a SAR, mission, and/or that the pilots association was acting as an agent of the United States, is without merit and must be rejected.

IV. THE UNITED STATES COAST GUARD DID NOT WORSEN THE POSITION OF THE VICTIMS OF THE MORNING DEW TRAGEDY

Plaintiffs contend that the United States worsened the position of decedents because "the pilot boat's response envisioned that a further Coast Guard response would be made,[8] and by the failure of the Coast Guard to have

8. Plaintiffs' assertion that the pilot association "envisioned" a further Coast Guard response is irrelevant and unsupported by the facts. The Coast Guard never represented, or implied, that it would also conduct a SAR mission. Given the content of the conversation between Petty Officer Shelley and the pilots association, any assumption by the pilots association that the Coast Guard would also respond to the scene is not reasonable — Shelley specifically told the pilots association that the Coast Guard would decide if it was going to get underway. Moreover, the record establishes that the pilots

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responded." Even if the court agrees that the United States undertook a SAR mission, either acting on its own or through the pilots, plaintiffs' claims are still subject to dismissal because the United States did not engage in any conduct that worsened the position of the plaintiffs' decedents. In short, the Coast Guard did not take any actions that deterred anyone from searching for the victims of the MORNING DEW tragedy, and it did not take any actions that placed decedents in a worse position following the sinking of the MORNING DEW. Consequently, summary judgment must be granted in favor of the United States.

Of all the branches of jurisprudence, the admiralty must be the most hospitable to the impulses of man and law to save life and limb and property, See, e.g., *Gribsby v. Coastal Marine Service of Texas, Inc.*, 412 F.2d 1011, 1021 (5th Cir. 1969), *cert. denied*, 396 U.S, 1033 (1970). Accordingly, in admiralty, a rescuer will be liable for damages only if: a) the rescuer was grossly negligent and the conduct worsened the position of the vessel or persons to be saved, *United States v. DeVane*, 306 F.2d 182 (5th Cir. 1962), b) the rescuer was reckless and wanton in the attempt to rescue which worsens the condition of the persons or property in marine peril, *Furka v. Great Lakes Dredge & Dock*, 825 F.2d 330 (4th Cir. 1987), or c) the rescuer's actions caused other would-be rescuers to cease or withhold their rescue attempts to the detriment of

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association decided to continue its search efforts until sunrise, without regard to the Coast Guard's intentions. Thus, regardless of what the pilots association "envisioned" that the Coast Guard would do, they made their own decisions regarding what they would do. They acted on their own, as Good Samaritans.

the party to be rescued. *United States v. Sandra & Dennis Fishing Corp.*, 372 F.2d 189 (1st Cir. 1967), *cert. denied*, 389 U.S. 836 (1967).[9]

In this case, the Coast Guard did not take any action that worsened the position of the decedents. The MORNING

9. See, also, *Albinder v. United States*, 703 F. Supp. 246 (S.D. N.Y. 1988) (the Coast Guard is subject to liability only when it causes the parties being rescued to detrimentally rely on the Coast Guard's efforts, or when its failure to exercise due care otherwise increases the risk of harm); *Patentas v. United States*, 687 F.2d 707, 717 (3rd Cir. 1982); *Kurowsky v. United States*, 660 F. Supp. 442, 450 (S.D. N.Y. 1986); *Wellington Transportation Co. v United States*, 481 F.2d 108, 111 (6th Cir. 1973); *United States v. Devane*, 306 F.2d 182, 186 (5th Cir. 1962); *Miller v. United States*, 614 F. Supp. 948, 954 (D. Me. 1985); *Frank v. Unites States*, 250 F.2d 178 (3rd Cir. 1957); *Hood v. United States*, 695 F. Supp. 237 (E.D. La. 1988) (noting that the Coast Guard had not made any affirmative representations that it would provide a service that it ultimately did not provide); *Berg v. Chevron, U.S.A.*, 759 F.2d 1425, 1430 (9th Cir. 1985) (a rescuer will be held liable only (1) for negligent conduct that worsens the position of the victim or (2) for reckless and wanton conduct in performing the rescue); *Korpi v. United States*, 961 F. Supp. 1335, 1347 (S.D. Cal. 1997) (the standard of care applicable in rescues undertaken at sea is that the rescuer will be liable for damage only (1) for negligent conduct that worsens the position of the victim, or (2) reckless and wanton conduct in performing the rescue); *Wright v. United States*, 700 F. Supp. 490, 494 (N.D. Cal. 1988) ("a rescuer will be liable for damages only if (1) it was negligent and its conduct worsened the position of the vessel to be saved; or (2) it was reckless and wanton in its attempt to rescue the vessel"); *DFDS Seacruises v. United States*, 676 F. Supp. 1193, 1201 (S.D. Fla. 1957) (the Coast Guard is liable only if (1) it was grossly negligent or reckless in its attempt to save the SCANDANAVIAN SEA, or (2) it was negligent and worsened the condition of the ship).

DEW would have sank whether or not the Coast Guard responded. Unlike *Sandra & Dennis*, 372 F.2d at 190 (the Coast Guard dragged plaintiffs' fishing vessel over a shoal, causing it to sink), the decedents in this case were not exposed to any increased risk as a result of the Coast Guard's conduct. See, *Patentas v. United States*, 687 F.2d 707, 717 (3rd Cir. 1982) (''increased risk" means some physical change to the environment or some other material alteration of the circumstances). See, also, *Rodrigue v. United States*, 788 F. Supp. 49, 52 (D. Mass. 1991) (finding that there had been no increased risk because the Air Force did not change the conditions of the water, limit the decedent's ability to reach shore, or prevent others from attempting rescues); *Oxman v United States*, 1994 A.M.C. 501 (D. OR 1993) (the Coast Guard had not worsened the claimants' position — the vessel would have sunk whether or not the Coast Guard attempted a rescue); *Mazullo v. United States*, 1980 A.M.C. 1038 (D. DC 1979) (finding that Coast Guard's failure to respond to mayday call did not worsen position of decedents). Without question, the Coast Guard did not cause the MORNING DEW to sink, and it did not take any action that changed the environmental conditions faced by its victims on the night in question.

The contemporaneous record also establishes that the Coast Guard did not worsen decedents' position by preventing rescue efforts by other parties, or by causing third parties to cease, or limit the scope of, ongoing rescue efforts. The Coast Guard did not represent that it would launch assets, get underway, or otherwise attempt rescue until sometime after 11:00, when it was notified that bodies had been discovered. As discussed above, the Coast Guard did not make any

statement that could have lead the pilots association, or any other potential rescuer, to limit, cease, or not commence search efforts. Instead, the Coast Guardsman who received the call from the pilots association advised that the information would be passed on to the station, and that they would decide IF they were going to get underway also. Moreover, although the pilots office advised the Coast Guard that they had found nothing and were going to stop looking, the pilot aboard the PEARL ACE asked the operator of the PALMETTO STATE to continue searching until daylight. The contemporaneous record establishes that the decision to continue searching was made independently, without any Coast Guard input. Given these facts, there was no reliance on the Coast Guard by the pilots. Instead, they made their own determination, based on the information they had, and the resources they had in the area, to continue searching. See *Mazullo*, 1980 A.M.C. at 1048 (observing that the SILBA and WASA, which had transmitted mayday messages received by the SEA BOY, were not diverted, nor were any rescue operations on their part thwarted, by the Coast Guard). This is certainly not a case where the Coast Guard worsened the position of the decedents by causing would-be rescuers to rest on their oars or, cease their rescue attempts. See *Lacey v. United States*, 98 F. Supp, 219, 220 (D. Mass. 1951) (dismissing plaintiffs complaint because there was no showing that the Coast Guard's rescue attempt reached the stage where other would-be rescuers were induced to cease their efforts in the belief that the Coast Guard had the situation in hand).

Furthermore, there can be no claim based on the theory that the decedents themselves acted in reliance on any

promise or representation by the Coast Guard because two-way communications between the MORNING DEW and the Coast Guard were never established. See, e.g., *In re CGC POINT JUDITH*, 1989 A.M.C. 2367 (C.D. Ca. 1987) (finding that the decedent did not act in reliance upon the Coast Guard since radio communications were never established); *Mazullo v. United States*, 1980 A.M.C. 1038 (D. DC 1979) (because the Coast Guard had not succeeded in making direct communications with the SEA BOY, no representations were ever made to the SEA BOY's passengers concerning any rescue efforts to be undertaken by the Coast Guard).

The indisputable facts of this case establish that the Coast Guard did not engage in any conduct that worsened the position of decedents. Accordingly, summary judgment should be granted in favor of the United States.

CONCLUSION

For the above stated reasons, summary judgment should be granted in favor of the United States and plaintiffs' complaints should be dismissed.

Date: March 14, 2000

Respectfully submitted,

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